IN THE

United States Circuit Court of Appeals

For The Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Appellee.

2693

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellant

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STATEMENT OF THE CASE.

This is an action for specific performance brought by vendor, the appellee, under an alleged contract to sell a telephone exchange and certain toll lines to appellant. A decree was entered as prayed for and an appeal taken therefrom.

The complaint alleges the corporate capacity of appellant and appellee and that appellee was the owner, and operating a telephone exchange in Davenport, Washington, with suburban lines therefrom and toll lines reaching several towns and communities, also a toll line extending to the city of Spokane, Spokane County, and as well a considerable quantity of telephone poles and other material in stock. That its poles were set generally in public highways and that "plaintiff owned and held and possessed public or private easements for the maintenance of all its telephone lines as hereinbefore described." (Trans. pp. 2-3). That on June 20, 1914, the appellant gave plaintiff a letter in two paragraphs; the first paragraph of the letter providing that "in the event of the consolidation of the two exchanges now in Spokane" the appellant agrees to make a contract with the appellee, giving the appellee "a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane." To understand the significance of this paragraph a brief explanation of the situation is necessary. There were two exchanges in the city of Spokane, one the Pacific (a Bell Company) and the other the Home. A company called "Interstate" had a telephone system in Northern Idaho with a toll line to Spokane connected with the Home exchange. The Pacific Company also had a telephone system extending from Spokane and covering northern

Idaho. One of the Bell companies had acquired control of the Home and the Interstate and the United States Government had brought a suit in equity against the various Bell companies in the Northwest and against various independent companies, alleging violation of the Sherman Anti-Trust Act in that the Bell companies had purchased various independent companies, or the control thereof, thus stifling competition. A short time before June 20, 1914, a decree had been entered in this suit which, among other things, required the Bell Company to sell its interest in the Interstate Company and also to sell its interest in the Home Company, but as to the latter the decree provided that if the city authorities of Spokane should desire a consolidation of the two exchanges in Spokane that the Pacific Company might file a petition requesting a modification of the decree so as to permit the same and in that event the Interstate Company should have connection with the consolidated exchange. Appellee had at this time connection with the Home Company and through that exchange connection with the Interstate Company and was doing an interstate business. At the time this letter was written the city council of Spokane had before it the question of the consolidation of the two exchanges but had not reached a conclusion as to whether they did or did not desire such consolidation. Reading paragraph 1 of this letter (Trans. p. 4), it will be seen that the Pacific Company agreed that in case of consolidation of the two exchanges that the appellee would have connection with the consolidated exchange and through

that exchange with the system of the Interstate Company. This concession was clearly of great value to the appellee because the Home exchange was very small, while the Pacific exchange was very large. A short time after the date of this letter the city council of Spokane resolved in favor of the consolidated exchange and a petition therefor was accordingly filed in the government suit and the decree accordingly modified. The appellant has never questioned the right of the appellee to be connected, as set forth in this paragraph, and expressly so concedes in the answer.

The second paragraph of the letter provides that if the appellee should desire to sell its property to the appellant and so notifies the appellant in writing within sixty days, an appraisement shall be made of the reproduction value of the property by Mr. West (to whom the letter is addressed) and by an engineer selected by the appellant, and if they fail to agree a third party is to be brought in and "the Pacific Company will thereupon pay the amount so fixed and the Davenport Company will thereupon convey to the Pacific Company *that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.*" (Italics ours).

On August 10th a letter was written by Mr. West to the appellant stating that the appellee desired to sell the property in accordance with the terms of the letter of June 20th.

The complaint further alleges that Mr. West and an engineer of the appellant thereafter appraised the property at the sum of Thirty-four Thousand Six Hundred Twenty-three Dollars ($34,623.00). The complaint also alleges that the appellee is the owner of this property and can make good and indefeasible title thereto and has offered "to make title to it by good and sufficient conveyance of all the property belonging to said system *or of such part thereof as defendant may declare it is lawfully entitled to acquire,* and has demanded of it that it receive such conveyance and pay the plaintiff the purchase price as fixed by said appraisers, but the said defendant refused and ever since has refused to accept a conveyance of said property or to pay to the plaintiff the purchase price thereof."

It is alleged in paragraph 6 of the complaint (Trans. p. 7) that the defendant undertakes to excuse itself for refusal to pay by saying that it is precluded by the anti-trust laws of the United States from acquiring any part of said property and that its contract is contrary to said laws and therefore not binding, but that appellee alleges the fact to be that none of the telephone lines belonging to it come in competition with any telephone lines belonging to the appellant "except the toll lines before described, extending from Davenport, Washington, to Spokane, Washington, and that the right to acquire such line was discussed between plaintiff and defendant prior to its offer of June 20, 1914, and that the status of the said line and the want of ability of the defendant

to lawfully acquire it, if indeed there be such inability, was as well known to it then as it is now."

Paragraph 7 of the complaint contains certain allegations relative to the value of appellee's property but no evidence was introduced on this subject and no attention need be paid thereto.

Paragraph 8 alleges that the appellee is ready, willing and able to make title to all or any part of its properties and now tenders "whenever the said defendant shall elect the part of the properties of said system it is willing to receive or in default of such election, *on the judgment of this court determining that the defendant may lawfully acquire from plaintiff any part or all* of the property of its said system." to deposit in the registry of this court for appellant, in accordance with said judgment, good and sufficient bills of sale and deeds.

The only other material allegation of the complaint is an allegation that the appellant has actually partly performed, by receiving 525 telephone poles. As these were received under a contract that this act should not be treated as part performance of the disputed contract and the poles should be paid for without regard thereto, and the learned trial judge so found, no further attention need be paid thereto.

The answer admits the corporate capacity of the parties. Denies that the appellee had any franchise to operate a telephone exchange in Davenport or was the owner of such exchange or any part thereof, and denies that the appellee was the owner

of the other telephone property referred to in the complaint. Admits that the appellee was in possession of a telephone line from Davenport to Spokane, and denies that it had any grants of easements or franchises in public highways. Admits the writing of the letter of June 20th and the receipt of the letter from Mr. West set out in the complaint. Admits that before the title to the property had been examined by its attorneys or the validity of said writings had been considered or passed upon it requested one of its employees to act with Mr. West in making an appraisement of the property and that these two persons made such appraisement and signed the appraisal set out in the complaint. Denies that there was any part performance of said alleged contract, and alleges a written agreement between the parties whereby the poles referred to were taken by the appellant. (The court below found with the appellant on this issue.) Admits that Mr. West has demanded payment and offered to execute a deed and that the defendant has refused to accept same. Admits that it has stated to said West that it is precluded by the Sherman Anti-Trust Act from acquiring said property, but denies that that is the only reason for appellant's failure to make payment. Denies the other remaining allegations of the complaint and affirmatively alleges:

(a) That the paper writing of June 20th is not a contract and that there was never any valuable or lawful consideration therefor.

(b) That the attorneys for appellant have examined the title to the properties referred to and that such title is not acceptable to said attorneys and they have so advised appellant.

(c) That the plaintiff has not, as a matter of fact, merchantable title to said properties.

(d) That the appellee has not even a franchise or permit to operate an exchange in the city of Davenport.

(e) That on June 20, 1914, and for many years theretofore and ever since, the appellant has been engaged in interstate commerce in telephonic communication between the states of Idaho and Washington and has controlled and operated telephone lines between nearly all of the cities and towns in the state of Idaho in the northern part thereof and nearly all of the cities and towns in the state of Washington, whereby the people residing or being in one state may have and do communicate telephonically through the lines operated by the appellant with the people residing or being in the other state. That on June 20th and before and since toll lines which the appellee claims to own extending from Davenport and Reardan and other communities to Spokane were connected telephonically with the lines of a system which was being operated in competition with appellant's telephone lines between eastern Washington and northern Idaho, which system belonged to the Interstate Telephone Company and the Home Company of Spokane, and there was a contract be-

tween the appellee and the other companies providing for such connection and by virtue thereof appellee was engaged in interstate commerce, transmitting telephone messages between various points in the state of Washington and various points in the state of Idaho, whereby those resident or being in one state could or did talk over the said lines with those resident or being in the other state.

(f) That in July, 1913, the United States Government brought an action in the United States District Court for Oregon against this appellant and other companies for the purpose, among other things, of preventing appellant from acquiring the property of the Interstate Company referred to, and the property of the Home Company referred to, upon the ground that such acquisition would violate the terms of the Sherman Anti-Trust Act, and in said action prior to June 20, 1914, a decree was entered perpetually enjoining appellant from acquiring said properties, with the qualification that if the local authorities of the city of Spokane should decide in favor of the consolidation of the two exchanges in that city, to-wit, the Home exchange and appellant's exchange, then said decree might be modified to permit such consolidation, but with the proviso that the Interstate Company should be connected with and have the benefit of such consolidated exchange and said competition in interstate telephonic communication should be continued, all of which was well known to the appellee on June 20th, 1914. That appellant, at said time, desired to have said two exchanges thus consolidated

and expected to obtain municipal consent thereto and in order to protect the appellee in its connection in Spokane and thereby with the system of the Interstate Company and to protect its interstate business, the appellant agreed with Mr. West as set forth in paragraph one of said letter of June 20th.

(g) That the telephone line or system described in the complaint was on June 20, 1914, and ever since has been, of no value to the appellant because merely a duplication of the plant owned and operated by the appellant.

(h) That the sale of the property referred to to the appellant by the appellee would be in violation of the Sherman Anti-Trust act and that the same would be in restraint of trade or commerce in telephonic communication between the two states mentioned and would tend to monopolize such commerce.

(i) That said sale would also be in violation of the decree in the suit brought by the United States Government, which decree was known to the appellee on June 20th, 1914.

(j) That at the time of signing said paper writing the real situation was not appreciated by the appellant and as soon as the matter was submitted to its counsel it was advised by them that said contract was in violation of said act of Congress and said decree and void and unenforceable for other reasons, and immediately thereafter appellant so notified said West.

(k) That said paper writings are also void and unenforceable under the Statute of Frauds of the State of Washington.

(l) That the appellee has a full, complete and adequate remedy at law and this court is without jurisdiction in equity.

The evidence is brief and practically without conflict, as stated in the opinion of the trial judge. It established that Mr. A. G. Avery of the firm of Post, Avery & Higgins, for many years attorneys for appellant, made a careful examination of the title and found and reported the same unsatisfactory and unmerchantable. It is not contended that he was not thoroughly competent to pass upon the question, nor is it contended that his action was arbitrary or capricious. The trial judge decided that inasmuch as no name was specifically set out in the letter of June 20th in the clause, "the title to such property to be acceptable to the attorneys for this company," that that clause was unenforceable.

The evidence established that Mr. West knew what attorneys would examine the title and told Mr. Avery that he claimed title through two judicial proceedings; as to the major part of the property through a mortgage foreclosure, and as to the remainder, but a material part, through a bankruptcy proceeding. The findings of fact in the mortgage foreclosure, constituting a material part of the judgment roll under the Washington statute, set forth that one H. H. Reynolds had legal title to the

property. He was named as a party defendant and did not appear and was not served with process. The court in that proceeding held that it was unnecessary to bring him into court because he acquired the property with knowledge of the trust deed or mortgage which was being foreclosed. The trial judge admitted that no title was acquired under the mortgage foreclosure proceeding, saying, "Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way." (Trans. p. 36). Appellee introduced in evidence a bill of sale from Mr. Reynolds to Washington Consolidated Telephone & Telegraph Company, dated May 8, 1911, one of the defendants in the mortgage foreclosure action, which bill of sale antedated the findings of fact and decree in the foreclosure case, the latter being dated May 31, 1912. This bill of sale was not shown to Mr. Avery, nor did Mr. West claim that the same constituted a muniment of title until the day of the trial. (Trans. pp. 91, 100). The trial judge held that this bill of sale cured that defect in the foreclosure proceedings. This will be discussed later. The record of the bankruptcy proceedings showed that the same was started by a petition on March 26, 1913, and that on May 11th of the same year the attorney for all of the creditors who had appeared therein signed a stipulation that said proceedings should be dismissed for the reason that the claims had been fully paid and satisfied. This stipulation was never set aside. Subsequently a document was filed purporting to be an assignment of the claims of these same creditors

to one W. W. Smith, the assignment being signed by the attorneys for the creditors, and Smith filed a petition stating that he was assignee, asking for an order directing that the bankruptcy proceedings "be proceeded with," and in October, 1913, such an order was made. The same Mr. West was appointed trustee in bankruptcy. The description of the property in the inventory is indefinite, stating that there are toll lines for about twenty-two miles, but there is no statement whereby the toll lines could be located. The same attorney appeared for the bankrupt, for the trustee, for the creditors and for the purchaser. This W. W. Smith became the purchaser and joined Mr. West in the present appellee. He gave a bill of sale of the property, with an indefiinite description, to the appellee and became a stockholder therein. (Trans. 102-3).

The evidence showed and it was conceded that the appellee and appellant were both engaged in interstate commerce in competition with each other and that while that business was not large it was admitted (Trans. pp. 77-8) that the appellee desired to do an interstate business and considered it an important part of its business, and we quote a part of the testimony relating thereto on cross-examination of Mr. West.

> "Q. Were you so eager to get this contract with the Interstate Telephone Company, Limited, in order to do business with Mount Hope, Garfield and Palouse (which are towns in Washington), or was it in order to do business with Coeur d'Alene, Wallace and Post Falls and towns in

northern Idaho? (Coeur d'Alene, Wallace and Post Falls are in Idaho).

A. May I state here—

Q. Please answer the question.

A. All the points of course.

Q. That is you were anxious to do an interstate business with northern Idaho?

A. I did not want any connection we had enjoyed in the past disrupted.

Q. You thought that was an important part of your business?

MR. TURNER: We will admit that.

MR. POST: Well, it is admitted that was an important part of your business, the interstate business with northern Idaho. Do you admit an important part of the business of the Davenport Independent Telephone Company was interstate business with northern Idaho?

MR. TURNER: I admit the amount done about twenty-two dollars per year.

THE COURT: It was admitted they were doing some interstate business. I do not think the extent of the business would make any difference with the Sherman Act."

The pleadings and decree in the suit brought by the United States Government referred to were admitted in evidence and show that the purchase of this property by the appellant would be contrary to the spirit, and, we think, the letter thereof, and the will of the Government.

That such was the understanding of the parties at the time these letters constituting the so-called contract were written and that for that reason and other reasons there was no binding contract enforce-

able in equity between the parties is shown by a letter introduced in evidence by the appellee written by Mr. West to Mr. Kingsbury, vice president of the American Telephone & Telegraph Company, in which Mr. West stated (Trans. p. 57): "You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement with your assurances that it would be carried out." The nature of the business at hand was the obtaining from the city council its consent to a consolidated exchange. Mr. Kingsbury promptly replied (Trans. p. 59), stating that he was unaware that any agreement had been entered into and "We are under commitment to the Department of Justice at Washington in regard to the purchasing of independent properties and we must not break our commitment. In some respects it is probable that we have promised to abide by the decision of the Department of Justic in matters which might not be, strictly speaking, illegal; but whether a certain transaction would be considered legal or illegal would not influence us so far as the carrying out of our commitment is concerned. That we must do in all cases."

Other material facts will be best referred to in the argumentative part of this brief.

SPECIFICATIONS OF ERROR.

1. The court erred in holding that the plaintiff is entitled to a decree of specific performance. A decree should have been entered dismissing this action.

2. The alleged contract was not authorized by the stockholders nor at any regular or called meeting of the directors. The court erred in holding that there was any binding contract.

3. The alleged contract is indefinite and uncertain in its terms and the court erred in refusing to hold that for that reason specific performance should not be decreed.

4. The opinion of appellant's attorneys adverse to the title is conclusive, and the court erred in holding that it could ignore the provision of the alleged contract that the title to the property must be "acceptable to the attorneys" of the appellant and in holding that provision to be nugatory.

5. The title is in fact unmerchantable and the court erred in holding to the contrary.

6. The court erred in holding that the purchase of this property would not violate the Sherman Anti-Trust Act and in holding that a court of equity would compel such acquisition notwithstanding the Sherman Anti-Trust Act.

7. The court erred in holding that the purchase of this property would not violate the decree of injunction granted against this appellant and others on

behalf of the United States before the so-called contract was made (of which decree the appellee had notice), and in holding that a court of equity would compel such acquisition notwithstanding said injunctive decree.

8. The court erred in holding that the opinion of appellant's attorneys that the appellant could not "lawfully acquire" this property was not conclusive and in holding that the court could compel the acquisition of this property notwithstanding such opinion.

9. The court erred in holding that a court of equity would enforce this alleged contract by decree of specific performance notwithstanding the written statement of the appellee that the "circumstances" surrounding the making of same and "the nature of the business at hand" were such as to constitute the same unenforcible and notwithstanding the evidence relating to such circumstances and business showed that the same related to matters pending before the legislative body of a municipality and to interstate commerce.

10. The remedy at law is adequate and the trial court so held, but erred in holding that notwithstanding that fact a court of equity should take jurisdiction and enter a decree.

ARGUMENT.

Contract uncertain in its terms.

The so called contract is so indefinite and uncertain in its terms as to deny specific performance. The language of paragraph 2 of the letter (Trans., p. 4), omitting the parts immaterial to the point, is:

> "In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company * * * and the Davenport Company will thereupon convey to the Pacific company *that portion of its property which the Pacific Company may lawfully acquire,* the title to such property to be acceptable to the attorneys for this company."

Does that mean that the appellant agrees to pay the appellee the reproduction value of *all* of the property of the appellee although the appellant may not "lawfully acquire" but one-half or one-third or one-tenth or none of said property? Such is the interpretation put thereon by the complaint.

Paragraph VIII of the complaint (Trans., p. 8) states that the appellee will convey all or any part of the property "Whenever the said defendant shall elect the part of the properties of said system it is willing to receive." And that paragraph further states: "or in default of such election, *on the judgment of this court determining that the defendant may lawfully acquire from plaintiff any part of or all of the properties of said system.*" But the prayer of the complaint is not

that the appellee shall recover the value of the property which the appellant may lawfully acquire, but the appraised value of *all* of the property, to-wit, $34,623.00. If the contract means that the appellant shall pay the appellee the reproduction value of all of the property, although it may not lawfully acquire any of it or only a part of it, then the contract is unconscionable and inequitable and clearly unenforcible under the rule laid down by the Supreme Court in Willard v. Tayloe, 8 Wallace, 557, and Wesley v. Eells, 177 U. S., 370.

The contract may possibly mean that the appellant shall take title to that which it may "lawfully acquire" and pay the reproduction value of that part only, leaving the remainder with the appellee. It may be that the parties had in mind that the appellant might lawfully acquire some part of the property notwithstanding the Sherman Anti-Trust Act and the government decree but that it could not acquire some other part of the property because of said act and decree.

Whatever it in fact means, it is clear that the contract contains no description of the property to be conveyed and either that such description is to be obtained from the appellant's attorneys or it is to be ascertained by a judgment of the court. If it means that such description is to be obtained from appellant's attorneys, then no decree can be granted herein because the attorneys have concluded that the appellant may not *lawfully* acquire any of this property (more fully argued below). If it means that this question shall be determined by the court (which is not stated in the con-

tract) or if this most important question of fact is left open for future determination, either by the parties themselves or in any other manner, the contract is incomplete as to an important provision.

The one certainty in relation thereto is that the contract is vague and uncertain and that the terms thereof are not so precise as that neither party could reasonably misunderstand them. Under such circumstances a court of equity will not decree specific performance.

The case of Colson v. Thompson, 2 Wheaton 336, lays down the rule as follows:

> "The contract which is sought to be specifically executed ought not only to be proved but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it but will leave the party to his legal remedy."

The Supreme Court cited the above quotation with approval in Dalzell v. Dueber Manufacturing Co., 149 U. S., at page 326, adding thereto a quotation from other authorities to the effect that a court of chancery will not decree specific performance "unless the proof is clear and satisfactory both as to the existence of the agreement and as to its terms."

In Walcott v. Watson, 53 Fed. 429, 435, Judge Hawley stated the rule as follows:

> "Whether a contract be such as is provable by parol, or is required by the statute of frauds to be in writing it must be certain and unequivocable in

> all its essential terms, either within itself or by reference to some other agreement or matter, or it cannot be specifically enforced."

In Minnesota Tribune Co. v. Associated Press, 83 Fed. 350, 357, the principle is thus stated:

> "A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which the complainant seeks to enforce is vague or uncertain a court of equity will not interfere but will leave him to his legal remedy."

In Kane v. Luckman, 131 Fed. 609, 612, the court states the principle as follows:

> "Specific performance will not be decreed unless it is clearly shown that the contract is completed, and that its terms are fair, and so definite and certain that they cannot be reasonably misunderstood."

In Hildreth v. Duff, 143 Fed. 139, the contract was somewhat informal, like that in the case at bar. The court, commenting thereon, says:

> "Looking at the whole paper, it seems to me that Thibodeau had a right to understand that the contract related to Hilderth's business as then conducted, and that the machines mentioned in the body of the paper were not other than such as had already been made the subject of recitation. At any rate, the interpretation which the complainant seeks to have put on the general terms in the body of this paper is by no means so clearly its import as to meet the requirement laid down, as we have seen, by the United States Supreme Court. Nor can it, I think, be successfully maintained that the terms of this paper are so precise as that neither party could reasonably misunder-

stand them. The foregoing views lead to a decree adverse to the complainant."

FINALITY OF ATTORNEY'S OPINION AS TO TITLE.

The so-called contract set out in the complaint (Trans. p. 5) contains the following provision:

> "The Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, *the title to such property to be acceptable to the attorneys for this company.*"

It is conceded that Mr. West, the president of the appellee, came to Post, Avery & Higgins, attorneys for the appellant in Spokane, and gave them a written statement as to the sources of title and also certain original bills of sale. (Trans. p. 91). Mr. Avery, acting for the firm in the examination of the title, concluded that the same was unmarketable and unacceptable, and so reported. It is not contended that he was not competent or that he acted fraudulently, arbitrarily or capriciously. That this firm were and had been for a long time the attorneys for the appellant, is not questioned. The only reason given by the trial judge for refusal to enforce this stipulation is stated by him as follows (Trans. p. 37):

> "The memorandum contains a provision that the title should be acceptable to the attorneys for the defendant. No attorneys were mentioned, and under such circumstances I do not think that the attorneys should be held to be final arbitrators

whose decision can only be impeached for fraud or mere capriciousness."

That the fact that "no attorneys were mentioned" renders the stipulation of no force or effect, is, we believe, without support in principle or authority.

It is manifest that the reason for such a stipulation and its enforcement is stronger in a case of this kind than in that of an ordinary real estate transaction. Here the property was largely personal. The vendor asserted that he obtained a part thereof through bankruptcy proceedings and a part thereof through mortgage foreclosure. Questions would naturally arise as to municipal franchises, easements on public highways and across private property, validity of judicial proceedings, rights of creditors and power of the appellee to sell its entire property, and perhaps other questions. The letter of June 20th shows that the appellant was not seeking to purchase this property. It is merely an option given to the vendor provided certain conditions were fulfilled, to-wit:

(a) Notice in writing was to be given by the vendor within sixty days.
(b) That the vendee may lawfully acquire this property.
(c) That its attorneys should approve of the title.
(d) That an appraisement should be had, and, we think,
(e) That the attorneys should decide what if any property it may lawfully acquire.

It is evident that the appellant was seeking to avoid harassment and litigation and that this letter was

worded with that end in view. The principle is stated in 39 Cyc. pages 1509 and 1510, as follows:

> "It is perfectly competent for the parties to stipulate that the title of the vendor shall be such as will be pronounced good and merchantable by an attorney, title or trust company, or other third person, and the purchaser will not be required to take a title not so pronounced good so long as there is good faith, although the court may deem it good under the law. Under such a contract the approval or disapproval by such third person is conclusive if made in good faith and with no improper motive, although in the opinion of the court the title may be good as a matter of law."

In Allen v. Pockwitz, 103 Cal. 85; 36 Pac. 1039; 42 Am. St. Rep. 99, the stipulation in the contract was

> "Title to be examined and accepted or rejected by J. DeWitt Allen's attorney."

(No name mentioned.) The court said:

> "It was but a reasonable and prudent precaution on the part of the plaintiff to insist upon the condition that the title should be passed and accepted by his own attorney, contrary to whose opinion and advice he was unwilling to invest $35,000 in a city lot. * * * But in the case at bar, according to our construction of the contract, the only warranty of representation as to the quality of the title was that it should be acceptable to plaintiff's attorney. Therefore, the question whether or not the title was in fact a good marketable title is not involved as it was in the case cited by counsel for respondents; and since it appears that plaintiff's attorney rejected the title and it is not even suggested that the rejection was not the result of a sufficient examination and an honest opinion, the order granting a new trial should be reversed."

In Watts v. Holland, 11 S. E. p. 1015 (Va.), the same question arose. No attorneys were mentioned. The court said:

> "The contract bound the plaintiff and his associates to take the lands only in the event the titles on examination proved satisfactory; and if in good faith they were not satisfied with the titles after their counsel had examined and reported upon them, they were justified in abandoning the contract."

In Farm Land Mortgage Co. v. Wilde, 136 Pac. 1078, no attorney was mentioned in the contract, nor did the word "title" appear, the provision being "said abstract to be passed upon by a resident lawyer of Oklahoma employed by second party." An attorney was employed by the purchaser and he gave an opinion that the title was defective, and the court held the same to be final.

A similar stipulation was upheld in Atwood v. Fagen, 134 S. W. 765 (Texas). (No attorney was named.) The same court, in Grier v. International Stock Yards Co., 96 S. W. p. 79, enforced a similar stipulation, containing, however, the names of the attorneys for the purchaser.

In Smith v. Lander, 106 S. W. 703 (Texas), the court again enforced a similar stipulation where the examining attorney is not named.

In Whitener-London Realty Co. v. Ritter, 126 S. W. 856 (Ark.), the following stipulation was enforced:

> "It is further agreed that the conveyance of said timber and the abstract of title to the land upon which it stands is to be approved by some

> attorney selected by the party of the second part on or before the payment of the money and the execution of the notes herein provided for."

In Ives v. Crawford County Bank, 124 S. W. 23 (Mo.), in addition to the written agreement for the sale of land, there was an oral agreement that one A. H. Harrison was to examine the abstract of title. The court said:

> "And it may be further stated that where a contract provides that the title of the vendor shall be such as shall be approved by an attorney, then the approval and judgment of such attorney, in the absence of fraud or collusion, is binding on the parties, even though the attorney's opinion is wrong."

In Flannagan v. Fox, 26 N. Y. Sup. p. 48, affirmed by the Court of Appeals in 39 N. E. 857, without opinion, the contract provided for the approval of the title by a certain trust company. The court said:

> "In Hudson v. Buck, 23 Moak Eng. R. 808, 811, the court construed a contract to purchase 'subject to the approval of the title by the purchaser's solicitor' to comprehend something more than an obligation on the part of the vendor to tender merely a title free from valid legal objection. Indeed, the court intimated that the vendee's exaction of the condition that the title should be approved by his solicitor was regarded by it as an intentional precaution on his part against the possibility of being subjected to the vexation and expense of litigating disputed questions affecting the title by reason of his having entered into the contract of purchase; and such, it seems to us, was the purport of the covenant in the case at bar."

The distinction suggested by the learned trial judge

is manifestly untenable and without support in reason or authority. The attorneys for the appellant having in good faith disapproved the title, a court of equity cannot set aside the stipulation and compel the purchaser to do that which it never agreed to do.

Counsel for appellee will be forced to rely upon authorities where the contract provides that the title or performance shall be to the satisfaction of the *purchaser* instead of to the satisfaction of the attorney or some other third party. In such cases there is a division of authority, some cases holding that the purchaser is bound to be satisfied if the title is a marketable title; other cases holding that it is immaterial that the title is in fact good if the purchaser in good faith is not satisfied therewith. All of the authorities, however, hold that there is a plain legal distinction between these cases and those where the contract provides that the title shall be satisfactory to an attorney or some other third party. This is clearly pointed out by the text and the authorities in 39 Cyc. pp. 1509-10.

Title in Fact Defective. The rule is, as stated by Judge Andrews for the Court of Appeals in Fleming v. Burnham, 100 N. Y. 1 at p. 10:

> "A title open to a reasonable doubt is not a marketable title."

We are confident that the appellee does not have a marketable title. The learned trial judge conceded in his opinion that the muniments of title furnished by the appellee to the attorneys for the appellant did not show a marketable title but he held that a certain bill of sale

given by one Reynolds presented for the first time upon the trial made out a marketable title and that the defendants were bound to perform.

Mr. West called upon Mr. Avery and informed him as to the appellee's source of title, dictating to a stenographer a history thereof, stating that a part of it came through foreclosure proceedings instituted by the Washington Trust Company against the Local & Long Distance Telephone Company, the Trust Company purchasing at the sale and then conveying to Thomas, who conveyed to the appellee, and that the remainder of the property came through bankruptcy proceedings, Mr. West being trustee in bankruptcy, and conveyed to Smith and Smith conveyed to the appellee. (Trans. p. 91.)

Only a comparatively small part of the property came through bankruptcy proceedings, as testified to by Mr. West (Trans. pp. 52, 70). The Davenport exchange and the majority of the toll lines came through foreclosure proceedings. (Trans. pp. 68-70.)

That no title was obtained under the foreclosure proceedings, as shown by the judgment roll itself, is conceded by the trial judge and is not open to question. The findings of fact (Exhibit No. 7) establish that the mortgage was given by the Local & Long Distance Telephone Company (Finding No. 7); that the defendant H. H. Reynolds was not served with process and did not appear (Finding No. 11); that defendant Purdy was receiver of the Local & Long Distance Telephone Company and under order of court

sold all of its property on April 8, 1911, to H. H. Reynolds, and that said sale was confirmed (Finding No. 20); that said Reynolds purchased with knowledge of the mortgage and subject thereto (Finding No. 21); that the reason for making the Washington Consolidated Telephone & Telegraph Company a party defendant was because it owned a quantity of the bonds secured by the mortgage (Finding No. 16). The decree of foreclosure is based upon these findings. Inasmuch as there was neither service nor appearance on the part of the owner of the property, H. H. Reynolds, the decree of foreclosure was void and no title to the property was acquired by the purchaser at the sale, the Washington Trust Company, or by any vendee of it. This the trial judge conceded, saying (Trans. p. 36): "Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in that way." It is therefore clear that at the time Mr. Avery turned down the title his conclusion was right according to the evidence presented to him. The appellee had furnished him with its history of the title and its muniments of title, as it was bound to do. No suggestion had been made that it claimed title from any other source. Upon trial, however, it contended that it claimed title through a bill of sale given by Mr. Reynolds dated May 8, 1911, to Washington Consolidated Telephone & Telegraph Company. (Exhibit No. 4.) There is no bill of sale or deed from the latter company to anyone, but they claim that at the time of the entry of the foreclosure decree that company, in fact, owned the property and therefore the foreclosure

decree was valid and the sale thereunder was valid and title was obtained by the appellee through that sale. In other words, *they are seeking to prove that the findings of the court in the foreclosure case are false and because of their falsity the decree is valid,* and that is the reasoning of the trial judge. (Trans. p. 36.)

We confidently assert: (a) That the mere fact that Reynolds gave a bill of sale in May, 1911, does not establish that he was not the owner of this property *one year thereafter,* May, 1912, the date of the decree. (b) That a court of general jurisdiction having jurisdiction over the property and *having adjudicated that Reynolds was the owner of said property in May, 1912,* that such adjudication *is final* as to the parties to that suit and all claiming under them. (c) The plaintiff in that suit was the purchaser at the sale and conveyed to Thomas, who later conveyed to appellee, and appellee claims that it acquired the interests of the parties to that suit under that decree and that the mortgage on this property was thereby wiped out. (d) That in any event this court cannot in this proceeding, upon this record, adjudicate that the *findings* of the other court are *false* and on that theory compel specific performance by this appellant.

It is elementary that the burden is upon the appellee to establish that it has a marketable title and that "A title open to a reasonable doubt is not a marketable title."

It was not contended in the court below but may be contended here that the appellee got title to this pro-

perty through the bankruptcy proceedings, the bankrupt being the Washington Consolidated Telephone & Telegraph Company. A sufficient answer to such a contention is that this property was never listed, inventoried, or sold in the bankruptcy proceeding and the appellee has never contended that it obtained title thereto in that manner. If it did acquire that property in that way it got it subject to a mortgage which is still in existence because never foreclosed. We again call attention to the fact that the appellee never prior to the trial of this cause claimed anything through Reynolds or said bill of sale. (Trans. pp. 91, 96, 100.)

Mr. Avery also objected to title under the foreclosure proceeding because there was no sale of the franchises in the manner provided by statute. The court below brushed that aside with the statement that if the sheriff's return is fair upon its face he can make no objections and a judicial sale cannot be collaterally attacked. (Trans. p. 37.) We are not making any attack. We are entitled to have presented to us a title that is not subject to attack in any manner. The sheriff's return, which is an exhibit herein, is not fair upon its face and shows that the statute in relation to the sale of franchises was not complied with, the same being Sections 520 and 521, Remington & Ballinger's Codes, explained by Mr. Avery. (Trans. pp. 97-8.) The text of said statute is as follows:

> §520. "All franchises of every kind and nature heretofore or hereafter granted, shall be subject to sale upon execution, and upon order of sale issued upon foreclosure of mortgage, in the same

manner as any other personal property may be sold upon execution or upon order of sale under foreclosure of mortgage, except as hereinafter provided."

§521. "The levy of such execution or order of sale shall be made by filing in the office of the auditor of the county in which the franchise was granted, a copy of the same, together with a notice in writing that under such execution or order of sale, the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is to be sold, and the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered; and by serving a copy of such execution or order of sale and notice, upon the judgment debtor, or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to date of sale. Notice may be served upon a defendant in the same manner that summons is served in civil actions. The sale of any franchise under execution or order of sale upon foreclosure must be made at the front door of the court house in the county in which the franchise was granted, not less than twenty days after the levy of the execution, or order of sale and the giving of the notice as in this act provided."

That such statutes must be strictly complied with has been held by universal authority. See 17 Cyc. 947. The question was directly passed upon in Lawrence v. Times Printing Co., 22 Wash. 482 at p. 490.

A material part of the property is the exchange in the city of Davenport. That exchange would be valueless without a franchise. The appellant was certainly not purchasing mere junk. The appellee did not ac-

quire title to the franchise under the foreclosure proceeding. That point could be raised either by the municipality or the grantee of the franchise. The appellant is not estopped from raising this point by the fact that Mr. Post in good faith had a conversation with Mr. West in relation to this matter before the title had been finally passed upon by Mr. Avery, suggesting to Mr. West that he get an assignment of this franchise from the Local & Long Distance Telephone Company, and when informed by Mr. West that that was impossible conversed with him about getting some resolution from the City Council recognizing the assignment and that Mr. West got such a resolution. Mr. West testified (Trans. p. 66): "You did not tell me it would constitute an assignment that would give a good franchise but that it was the best that could be done under the circumstances."

That a court of equity will not force a title like this upon a purchaser is settled by authority and it of course makes no difference whether the title comes through a judicial sale or in some other manner.

In Holmes v. Wood, 32 Atl. 54 (Pa.), it was claimed that an undivided one-eighth interest in the property in question was acquired by the vendor through a partition sale. The court held it was not marketable, laying down the following rule:

> "A decree for specific performance is of grace, not of right. It will never be made in favor of a vendor unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee where he is able to show circumstances which would make it unconscionable to do so."

In Martin v. Hamlin, 57 S. E. 381 (Mass.), the vendor's interest came through a mortgage foreclosure. The opinion states:

> "Both parties concede that a mere possibility or suspicion of a defect in title will not prevent the ordering of specific performance, and that it will not be enforced when there is a fairly reasonable doubt as to the title."

The court then discusses the mortgage foreclosure proceedings and concludes its opinion by saying:

> "It is enough to hold that the validity of such a sale is so doubtful that no one should be compelled to take a title depending upon it for validity."

In Jeffreys v. Jeffreys, 117 Mass. 184, in determining the question of title, it was necessary to construe a will and the court held that, while they might be of the opinion that the title was good and might so decide in an action for damages, they would not decree specific performance, saying:

> "In an action of contract to recover damages for breach of the agreement the court would necessarily decide all such questions for the purposes of the suit and as between the parties to it because they affect the rights and obligations of the parties under the agreement, all of which are concluded between them by the judgment. But the consequences of such decision do not extend beyond that judgment. On the other hand, the effect of this proceeding in equity, if the plaintiff should prevail, would be to require the defendant to accept as perfect a title which he may hereafter be compelled to defend against encumbrances now pointed out, the validity and effect of which cannot now be conclusively determined as against future litigants who may seek to enforce them. *

> * * hence the propriety and the necessity of the rule in equity that the defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful."

This case is cited with approval in Wesley v. Eells, 177 U. S. 370, 376.

In Butts v. Andrews, 136 Mass. 221, we find this:

> "The plaintiff's title depends on the construction to be given to the peculiar phraseology of the will; and even if we were inclined to the opinion that he took an estate in fee still the title is not so clear that the defendant ought to be specifically compelled to accept it and thus to assume the risk of subsequent litigation with persons not now before the court."

In Fisher v. Eggert, 64 Atl. 957 (N. J.), that court lays down the following rule:

> "This court has uniformly refused to decree specific performance by a purchaser in all cases where the title of vendor cannot with certainty be pronounced free from doubts."

In Herman v. Somers, 38 Am. St. Rep. 851 (Pa.), the rule is stated as follows:

> "In equity a marketable title is one in which there is no doubt involved, either as a matter of law or fact."

In Townsend v. Goodfellow, 12 Am. St. Rep. 736 (Minn.), it is said:

> "The purchaser is entitled to a marketable title, one clearly shown to be good. It must therefore be free from reasonable doubt. If it rests entirely upon record evidence, and the muniments of title are preserved accessible it will be a question for

> the court to determine upon their inspection, a question of legal construction. If it is to be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in ordering specific performance."

The last sentence above quoted is pertinent in relation to the contention of appellee that the judgment roll in the decree of foreclosure is false in finding that Reynolds was the owner of the property.

The fact that in the foreclosure proceeding there was an allowance of Fifteen Hundred Dollars for attorney's fees for the plaintiff and that the property was bid in at the sum of Fifteen Hundred Dollars and the bondholders received nothing whatever would also challenge the attention of the careful lawyer because it is an invitation for an attack by the bondholders. We will now refer to the remarkable record in the *bankruptcy proceeding*. Three of the creditors of Washington Consolidated Telephone Company, having claims of about Thirty-five Hundred Dollars, filed a petition in bankruptcy on March 11, 1913. (Trans. p. 102.) In April an order was made adjudging the respondent bankrupt and requiring the filing of a schedule. In May a stipulation of the petitioners was filed stating that *their claims had been fully settled and satisfied* and that an order of dismissal might be entered. In October one W. W. Smith filed an alleged assignment to him of the claims of these petitioners signed only by the attorney for the petitioner, which assignment is dated May 5, 1913, the date of the stipulation that these same claims had been paid. (Trans.

p. 93.) At the time said stipulation was filed no other creditors had appeared. In November this same Mr. West was appointed trustee in bankruptcy. An inventory was filed in March, 1914, which inventory referred to some telephone lines but did not describe them, stating neither any terminus nor on what road or roads located. (Trans. p. 94.) In May there was entered an order authorizing the sale of the property to W. W. Smith for Twenty-one Hundred Dollars. On June 1, 1914, said Smith gave a bill of sale executed in Vermont of this same property to the appellee corporation, of which West, trustee in bankruptcy, was president, receiving therefor stock in this corporation. (Exhibit 13; Trans. pp. 52, 70.) West testified that in the transaction Smith was not here but was represented by O. B. Setters, his attorney. (Trans. p. 68.) Setters was also attorney for West as trustee in bankruptcy, for the bankrupt corporation and for the original creditors. (Trans. p. 105.) This friendly, harmonious, collusive bankruptcy proceeding would challenge the attention of even a careless examiner of titles. Furthermore, the two bills of sale (Exhibits 12 and 13) as well as the inventory, do not describe any telephone lines capable of location either from the records of the bankruptcy proceedings or from any other recorded conveyances but only, if at all, through oral testimony. The creditors got three per cent. in this proceeding, while, as noted above, in the foreclosure proceeding, they go nothing. It is not strange that Mr. Avery pronounced this title unsatisfactory. It is clearly unmerchantable, at least within

the definition of that term as used by the courts in actions for specific performance.

CIRCUMSTANCES UNDER WHICH THE AGREEMENT WAS MADE.

Under this heading we shall discuss:

(a) The Sherman Anti-Trust Act and Government decree.

(b) That the opinion of appellant's attorney that appellant could not lawfully acquire this property is final herein.

(c) The applicability of the principle ex turpi contractu non oritur actio.

Appellee put in evidence a letter written by Mr. West to Mr. Kingsbury in which he said: "You no doubt recall the circumstances under which an agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement with your assurances that it would be carried out." (Trans. p. 57.) The nature of the business at hand was the application to the city council of Spokane for its consent to the consolidation of the two Spokane exchanges. The Government decree, which was familiar to Mr. West, provided that the Bell interests should sell their holdings of stock in the Home Company unless the municipal authorities of Spokane should express their desire for a consolidation of the two exchanges, in

which event a petition might be filed in the government suit asking for a modification of the decree to permit such consolidation. Mr. Kingsbury, vice president of the American Telephone & Telegraph Company, Mr. McFarland, president of the appellant, and Mr. Pillsbury, its general counsel, were in Spokane at the time this letter of June 20, 1914, was written. The time for getting the city's consent had almost expired. The Government decree was entered March 26, 1914, and provided that a petition for consolidation must be filed within three months thereafter. The resolution of the city council authorizing the consolidation was passed June 22, 1914, and the petition for modification was filed June 24, 1914. These documents are in evidence. (Exhibits 20, 23, 24; Trans. pp. 101, 102). The letter of June 20th, dated at Spokane and signed by Mr. MacFarland also explains "the business at hand." That letter (Trans. p. 4) states: (a) That in the event of the consolidation of the two exchanges the appellant agrees to make a contract with the appellee giving the appellee a connection with the Consolidated exchange; and (b) In the event that the appellee desires to sell its property to the appellant and so notifies the appellant within sixty days, an appraisement, etc., shall be made and the appellee will convey to the appellant "that portion of its property which the Pacific Company may lawfully acquire." It is evident that the appellant did not desire to buy this property but that it did desire to avoid harassment on the part of appellee and its Mr. West, and that this letter of June 20th had direct relation to the application then

pending before the city council and the matter of obtaining permission from the council and the court to consolidate the two exchanges, and that is what is referred to in Mr. West's letter wherein he says: "You no doubt recall the *circumstances* under which the agreement was made *and that by reason of these circumstances* and the *nature of the business at hand* it was left largely in the nature of a *gentlemen's agreement* with your assurance that it would be carried out."

That a court of equity will not exercise its discretion to grant a decree of specific performance under such circumstances would seem to be beyond question.

See *Hazelton v. Sheckells,* 202 U. S. 71.
Hoffman v. McMullen, 83 Fed. Rep. 379 (Ninth Circuit).
Same case, 174 U. S. 639.

One of the circumstances was the fact that the appellee was engaged in interstate commerce in competition with the appellant. That is conceded. The appellee's present contention is that that commerce was not large enough to stay the hand of a court of equity. Whether or not the purchase of this competitor would constitute a violation of the Sherman Anti-Trust Act constituted a question of law and not of fact. Another circumstance was a decree in the Government suit entered in March 1914 and known to the appellee, which decree adjudged that the Bell companies had violated the Sherman law in acquiring independent properties around Spokane and perpetually enjoining them from, directly or indirectly, doing any act or thing in furtherance of the objects and purposes of said com-

bination and from attempting to monopolize said commerce or any part thereof "and from forming or joining any like combination in the future." (Par. III.) Paragraph 11 of the decree refers to the Spokane situation. It also appears from Mr. Kingsbury's letter (Trans. p. 59) that certain promises in relation to buying independent properties had been made to the Department of Justice at Washington. It is alleged in the complaint (Par. VI, Trans. p. 7) that appellant and appellee had discussed the question of violating the Sherman law by this transaction before the letter of June 20th was written. Mr. West concedes in his letter (Trans. p. 57) that because of this situation the contract was not enforceable but merely a "gentlemen's agreement." And we find in that letter (Trans. p. 5) the statement quoted above that the appellant is to purchase, if the appellee desires, that portion of the property which the Pacific Company "may lawfully acquire," the title to be acceptable to the attorneys of the company.

We submit that it was the clear intent of this letter that the legal questions involved should be passed upon by the attorneys for the appellant and that this "gentlemen's agreement" should not be brought into court. That this appellant should not be put in a position by any decision rendered in a case between these parties whereby the Government could say to the appellant that it had violated its agreement with the Department of Justice or had violated the letter or spirit of the decree in the Government suit or had violated the Sherman Anti-Trust Act, but that the question as to what

they might "lawfully acquire" was to be left to and determined by the attorneys for the appellant after they had had sufficient opportunity to investigate the matter. The evidence shows that the attorneys concluded that the appellant could not lawfully acquire this property and Mr. MacFarland so wrote Mr. West and that Mr. MacFarland and Mr. Pillsbury so told him personally. (Trans. pp. 56, 57.)

We submit that the conclusion of the attorneys being neither arbitrary nor capricious is final on that subject; and, second: That a court of equity under these circumstances will not exercise its discretion in favor of a decree of specific performance which may subject the appellant to prosecution, civilly or criminally, by the Government. The Government, not being a party, is of course not bound by this decree. The question as to whether or not the Sherman law was violated may or may not depend upon the amount of interstate business actually heretofore done by the appellee, which we will later discuss, but at this point we call attention to the fact that during the trial the learned trial judge took the position as follows:

> "THE COURT: It was admitted they were doing some interstate business. I don't think the extent of the business would make any difference with the Sherman Act." (Trans. p. 78.)

Thereafter he changed his mind on this subject, as shown in his opinion. But no matter which opinion is right it cannot be said that the question is so clear from doubt that a court of equity should by its decree compel us to buy and take title to and pay for this property,

and especially when it is conceded by the learned trial judge that the remedy at law is entirely adequate. (Trans. p. 30.)

That the granting or refusing to grant a decree of specific performance rests in the sound discretion of the court, taking into consideration the equities of the parties under all of the circumstances surrounding the case, was expressly decided in:

Willard v. Tayloe, 8 Wallace 557, 567.
Wesley v. Eells, 177 U. S. 370, 376.

That specific performance will not be decreed when the proof is not clear and convincing as to the terms of the contract and the meaning thereof was decided in:

Colson v. Thompson, and other cases cited above.

Nor when to grant the same would be contrary to public policy:

Beasley v. Texas-Pacific R. R. Co., 191 U. S. 492.

Nor when the remedy at law is adequate:

Hyer v. Richmond Traction Co., 168 U. S. 471.

Even though difficult of ascertainment:

Texas v. Railway Co., 136 U. S. 405.

Sherman Act and Government Decree.

We confidently contend that the purchase of this property would as a matter of law violate the provisions of the decree in the Government suit and the Sherman Anti-Trust Act. Paragraph XI of that decree refers specifically to the situation in eastern Washington and northern Idaho. It recites:

> "That for many years the Interstate Company has operated in Washington and Idaho about 512 miles of long distance telephone lines and about 10 exchanges and 190 toll stations; that its main lines are connected in Spokane with the Home of Spokane pursuant to a traffic agreement, and extend thence easterly into Idaho more than 100 miles; *that from these lines branch lines run north and south both in Washington and in Idaho;* and that its patrons can and do interchange communication with the patrons of the Home of Spokane."

There are other recitals in respect to the competition between this independent system and the Bell system and a special provision forbidding such competition. Paragraph III of the decree recites that the combination was entered into to restrain and monopolize commerce in telephonic communication between Washington and Idaho and Washington and Oregon and specifically perpetually enjoins this appellant and the other defendants "from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combination and from continuing as parties thereto, and from continuing to monopolize, or attempting to monopolize, said commerce or any part thereof, and from forming or joining any like combination in the future."

In the record is a map showing the lines of the Interstate Company and its branches, including the lines involved herein and the lines of the appellant, and showing that each of these two systems cover practically the entire territory of northern Idaho and eastern Washington in active competition. (Exhibit 16.) The lines in controversy herein constitute one of the

"branch lines" of the Interstate Company. It was not owned by that company but tied up to it with traffic agreements which are in evidence. (Exhibit 17.) The first agreement is dated September 28, 1909, to continue for the period of twenty-five years, and is between the Interstate Company as first party and the Local & Long Distance Telephone Company as second party. Paragraph 1 of that agreement is to the effect that second party agrees to build exchanges in Davenport and other towns and a toll line to Spokane to be connected with first party's system in Spokane. The second, third and fourth paragraphs provide for such connection and interchange of business. The ninth paragraph provides that the Interstate Company agrees not to compete with the second party along its line between Spokane and Davenport and not to connect with any other telephone company in that territory and that second party shall not compete with first party for telephone business in the territory occupied by first party nor connect with any other telephone company whatsoever. The twelfth paragraph provides that the first party shall publish in its telephone directory a list of all subscribers of the second party and second party shall furnish to its subscribers in each telephone directory it may publish a list of the subscribers and connections of the first party. The thirteenth and fourteenth paragraphs provide that each party will deliver *exclusively* to the other party all long distance messages and conversations covered by the lines of said party. In August 1911 a contract was entered into between the Washington Consolidated

Telephone & Telegraph Company, the Interstate Company and the Home Company of Spokane of similar purport and effect except that the period of that contract is ten years.

It is a matter of common knowledge that the branch lines, and often a part of the main lines, of an operating railroad company, are not usually owned by one corporation. Some times there is control by a majority stock ownership; sometimes there is a lease; sometimes there is an exclusive traffic agreement. The same is true of telegraph lines and telephone lines. Manifestly, the question of legal title to the roadbed of a railroad or the pole lines of a telephone or telegraph company is not decisive in determining either whether a certain line is or is not a branch line, or whether the severance of that line from a railroad system or a telegraph or telephone system and sale thereof to a competitor would violate the Sherman Anti-Trust Act. Clearly, under these contracts, the telephone lines involved herein constituted a part of the system of the Interstate Company and were a branch line thereof. The interstate business of the Interstate Company was not negligible and the purchase by the Bell interests of a majority of the stock of that company violated the Sherman Act. That was conclusively determined by the decree in the Government suit. A violation of that decree by this appellant would be contempt of court and subject it to punishment. Of course no court of equity would compel the appellant to violate the other decree.

It is conceded that interstate business was being done by the appellee. The amount of that business is not material. The amount of the business of the Interstate Company may be material and there has been a judicial determination of that question. Every trunk, whether railroad, telegraph or telephone, must have many branches. Each branch contributes to the life of the trunk. To hold that each branch may be cut off, one at a time, without violating the Sherman Act, by considering solely the amount of business done by each branch separately, and thereby the efficiency of the trunk materially decreased, would make an absurdity of the Sherman Act.

The contracts provide for further extensions in that prosperous section of the State of Washington partly covered by the Davenport line. The development of the resources of the country and the increase of population and the extension of this line mean greater interstate business. That competition actual and potential is thus destroyed. That these contracts and the connection through the Home of Spokane with the Interstate Company and the right to do business with northern Idaho are shown to be a matter of real importance to the Davenport line as well as the Interstate line by the contracts themselves (Exhibit 17) and by the testimony of Mr. West and the admission of his counsel (Trans. p. 78). A statement of the amount of the business actually done for six months before the trial is set forth in Exhibit No. 19. While that amount is not large, that fact is not conclusive, we think, under the Sherman Act and certainly not material so far

as the effect of the Government decree is concerned. We think that the trial judge's opinion given during the trial is the better one. He said (Trans. p. 78):

> "It was admitted they were doing some interstate business. I don't think the extent of the business would make any difference with the Sherman Act."

In United States v. Union Pacific RR. Co., 188 Fed. p. 102, the court decided against the United States, partly at least, because of the smallness of the competitive business, saying at page 116:

> "The aggregate of all the business done by the Union Pacific and Southern Pacific companies over all these routes for the years specified, which we believe fairly represent the general conditions prevailing at or before the Huntington stock was purchased, was, for the Southern Pacific Company, 0.88 per cent. of the entire tonnage of that system, and for the Union Pacific Company, 3.10 per cent. of its aggregate tonnage. Tables in evidence also disclose that the total revenue derived from the traffic over these minor routes by the Southern Pacific Company for the year preceding the year of the Huntington purchase amounted to only 1.25 per cent. of the total revenue of that system."

The Supreme Court of the United States held that although this business was comparatively small the Sherman Act was violated.

> *United States v. Union Pacific,* 226 U. S. 61, 88.

Adequate Legal Remedy.

Section 723 of U. S. Revised Statutes provides:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case

where a plain, adequate and complete remedy may be had at law."

The learned trial judge conceded that the remedy at law was adequate (Trans. p. 30), saying:

> "Viewed from the standpoint of the plaintiff alone there would seem to be an adequate remedy at law by an action for damages, the measure of damages in such cases being the difference between the contract price and the fair market value of the property. True, there might be some difficulty in proving the market value, but that is an ever present difficulty in all kinds of litigation."

He then holds that if the appellant as vendee had brought this action the remedy at law would have been inadequate and it would have been entitled to specific performance and under the doctrine of mutuality of remedy the appellee is entitled to the same remedy.

We think that the question is concluded by the United States Supreme Court in the case of Hyer v. Richmond Traction Co., 168 U. S. 471. In that case the complainant was an applicant for a street railway franchise. An ordinance granting such franchise was passed but the terms thereof were unsatisfactory. Plaintiff was assured that certain modifications would be made provided he made certain money deposits, which were made. He then learned that the defendant was seeking a similar franchise. Subsequently a banking house, which contemplated aiding the enterprise, advised a consolidation of the two interests and a contract was entered into whereby such consolidation was made, each agreeing to have a half interest in the en-

terprise. An ordinance was passed naming the defendant as grantee of the franchise. The plaintiff performed his part of the agreement and being ignored by the defendants, who formed a corporation, brought an action for specific performance and therein prayed "that he be decreed the owner of one-half interest in th Traction Company's franchise, property and stock, and specifically for certain orders to secure to him the possession and enjoyment of such interest." (p. 476.) The court said, at page 483:

> "But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in the case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of agreement to sell, but in cases where stock has no recognized value, is not purchaseable in the market or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of the contract to purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims, can adequate compensation be secured. At the same time the present value of the franchise, and therefore of the stock of the corporation owning the franchise, is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the popu-

> lation adjacent to the line, and therefore, the number of people likely to avail themselves of its advantages, the cost of construction and operation, are all well known facts, as upon such known facts it is not impossible for a jury to form a fair estimate of the value of the franchise, and therefore of the damages which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it."

A decree was entered dismissing the bill. Mr. Justice Brewer wrote the opinion. Mr. Justice Harlan wrote a short concurring opinion holding that the contract was detrimental to the public interests; that the ordinance named the grantee, and "Aside from these considerations, I am of opinion that if the plaintiff has any remedy at all, he has an adequate one at law. Upon this last ground I acquiesce in the judgment of the majority of the court in this case." Mr. Justice Brown, with whom concurred Mr. Justice Peckham, wrote a dissenting opinion holding that specific performance should be granted because "The corporation was but recently formed, the railroad yet unconstructed, and its shares of uncertain value, if indeed they had any marketable value at all."

We submit that under the doctrine announced in this case that if this appellant were complainant suing for specific performance, the same would be denied without regard to the uncertainty of the contract because of the adequacy of the remedy at law coupled with the fact that the vendor was engaged in interstate commerce in competition with the complainant, which competition would be destroyed, and because of

the letter and spirit of the Government decree and the circumstances surrounding the agreement and the fact that the parties themselves did not deem it to be a binding contract but merely a "gentlemen's" agreement.

MR. WEST NOT AUTHORIZED TO MAKE A CONTRACT.

It is elementary learning that neither the directors or a majority of the stockholders have power to sell all the corporate property of a solvent concern except by unanimous vote of all the stockholders.

See *Cook on Corporations,* 7 Ed. Vol. 3 §670 and cases there cited.

Appellee sought to prove this authority, offering in evidence certain minutes (Trans. p. 44), said minutes being those of the board of trustees, dated June 4, 1914. Witness later testified that the minutes were wrong because the meeting was held on June *30th;* that the recital in the minute that the offer made by appellant was on *May* 20th should have been June 20th (Trans. pp. 60, 61); and that he did not write these minutes until just a few days before the trial (Trans. p. 62). The by-laws provide that the regular meeting of the board of directors is held on the first Monday in each month, which would not be on June 4th but June *1st.* (Trans. 83). There is no minute of a meeting held on June 1st nor of one held on June 30th. All the trustees or directors were not present at this meeting, if one was held. (Trans. p. 45). Mr. West, on cross-examination,

testified that the company was entirely solvent (Trans. p. 63) and exhibited a resolution passed at the stockholders' meeting held in January 1914 purporting to authorize the trustees to negotiate for the sale or lease of the property (Trans. pp. 64, 65), but at that meeting *less than two-fifths* of the stock was present or represented (Trans. p. 65).

We therefore contend that under settled principles applicable to a solvent going concern that Mr. West was not authorized to sign the letter of August 10, 1914, set out in the complaint (Trans. pp. 5, 6), nor was any contract for the sale of the property entered into which was binding upon the appellee. If the appellant had brought an action for specific performance against the appellee that action would have of necessity failed for that reason, as well as for other reasons elsewhere referred to herein.

We respectfully submit that appellant is entitled to a decree dismissing this action.

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